

Office of Chief Counsel
Internal Revenue Service

memorandum

TL-N-4766-99
JForsberg

date: November 17, 1999

to: Chief, Examination Division, North Central District
Attn: Roger Eichten, Group Manager, Group 1216

from: District Counsel, North Central District, St. Paul

subject: [REDACTED]
Forms 870 and 872

Our advice has been requested as to the proper party to execute Forms 870 and 872 for the [REDACTED] consolidated group's taxable years ending [REDACTED] and [REDACTED]. For the reasons discussed, we recommend that the Forms 870 and 872 be executed [REDACTED].

FACTS

[REDACTED] was a Delaware corporation. For the taxable years ended [REDACTED] and [REDACTED], [REDACTED] filed consolidated returns as the common parent of a consolidated group (the "[REDACTED] group"). On or about [REDACTED], a Delaware corporation, acquired [REDACTED] percent of [REDACTED]'s stock. On or about [REDACTED], [REDACTED] acquired the remaining [REDACTED] percent of [REDACTED]'s stock. [REDACTED] thereby became a member of [REDACTED]'s consolidated group.

Effective [REDACTED], [REDACTED] was merged into [REDACTED], a Delaware limited liability company. [REDACTED]'s sole member was [REDACTED]. [REDACTED] was the surviving entity in the merger. Under DEL. CODE, Title 6, § 18-209(g) and Title 8, §§ 259(a) & 264(e), [REDACTED] as the surviving entity, assumed all liabilities of [REDACTED].

No election has been made to treat [REDACTED] as an association. Under the default classification of Treas. Reg. §301.7701-3(b)(1)(ii), [REDACTED] is disregarded as an entity separate from its owner (i.e., a "tax nothing").

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides generally that the common parent of a consolidated group is the sole agent for each subsidiary in the group for any consolidated return year. Expressly included in the authority of the common parent is the power to execute waivers. Treas. Reg. § 1.1502-77(a) further provides that its provisions shall apply "whether or not a

consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."

Treas. Reg. § 1.1502-77T provides for alternative agents where a corporation that is the common parent of a group ceases to be the common parent. Under Treas. Reg. § 1.1502-77T(a)(3) & (4), a waiver of the statute of limitations given with respect to the group will be deemed to be given by the agent for the group if it is given by any of the following:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
- (iii) The agent designated by the group under § 1.1502-77(d), or
- (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

In the present case, but for the possible impact of the check-the-box regulations, [REDACTED] would clearly be [REDACTED]'s successor-in-interest and could execute the Forms 870 and 872 in that capacity. However, under the check-the-box regulations, [REDACTED] is disregarded as a separate entity from [REDACTED] even though under Delaware law [REDACTED] is the entity which succeeds [REDACTED]. We have found no authority addressing this issue and are advised by our national office that to date the issue is unresolved. In the absence of any authority or guidelines on point, we recommend that any Forms 870 or 872 be executed in two different versions: one executed by [REDACTED] as successor to [REDACTED] and one executed by [REDACTED] as successor to [REDACTED]. As to the first version we recommend that:

- a. The line for the taxpayer's name should read:

[REDACTED] (EIN: XX-XXXXXXX) as agent for the [REDACTED] consolidated group and as successor-in-interest to [REDACTED] (EIN: XX-XXXXXXX);*

- b. The following footnote should be put at the bottom of the page:

* with respect to the consolidated income tax liability of [REDACTED] (EIN: XX-XXXXXXX);"

- c. The EIN of [REDACTED] should be used in the box for the taxpayer's EIN; and

- d. The signature block should use name "[REDACTED] (EIN: XX-XXXXXXX)" and should be executed by a current officer of [REDACTED]

As to the second version we recommend that:

a. The line for the taxpayer's name should read:

██████████ (EIN: XX-XXXXXXX) as agent for the
consolidated group and as successor-
in-interest to ██████████ (EIN: XX-XXXXXXX);*

b. The following footnote should be put at the bottom of the page:

* with respect to the consolidated income tax liability
of ██████████ (EIN: XX-
XXXXXXX);"

c. The EIN of ██████████ should be used in the box for the taxpayer's EIN; and

d. The signature block should use name "██████████"
(EIN: XX-XXXXXXX)" and should be executed by a current officer of
██████████.

While we are uncertain as to whether ██████████ or ██████████ is ██████████'s
successor, we believe one of the two is and that securing Forms 870
and 872 from both will protect the Service's position.

If you have any questions respecting this matter, please call
Jack Forsberg at 290-3473, ext. 227.

REID M. HUEY
District Counsel

By: *Jack Forsberg*
JACK FORSBERG
Special Litigation Assistant

cc: Assistant Chief Counsel
(Field Service)